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No. 87-400

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSE NUNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether law enforcement agents lawfully searched petitioner's car.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1987. The petition for a writ of certiorari was filed on July 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional plea of guilty in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 10 years' imprisonment, a special parole term of 20 years, and a fine of $7,500. The court of appeals affirmed (Pet. App. 1-10).

1. On June 3, 1986, the United States Marshal's office received information from an informant that petitioner planned to arrive at a parking lot in Philadelphia, Pennsylvania. Petitioner, who was then on bail in connection with charges of assault, resisting arrest, and carrying a loaded .22 caliber revolver, was wanted by federal authorities on a fugitive warrant. The marshals organized a task force of federal, state, and local officers and set up surveillance at the parking lot. Pet. App. 1-2, 7.

Petitioner arrived at the parking lot driving a 1984 Cadillac Eldorado and exited the car. When petitioner saw agents from the task force approach him, he reached into the car as if, in the words of one agent, he were "putting something into the car or under the seat." Pet. App. 2. Petitioner also pretended that he had just exited from a car parked next to his Cadillac (*id.* at 2-3).

The agents placed petitioner under arrest and asked him whether the Cadillac was his car. Petitioner initially denied that the car was his. The agents then frisked petitioner and discovered $740 in cash and a set of car keys with a Cadillac emblem. When the agents began a radio license check of the Cadillac, petitioner admitted that he owned the car. He refused, however, to allow the agents to search the car. Pet. App. 3.

The marshals submitted the evidence to an Assistant United States Attorney, who advised them that there were not sufficient grounds to obtain a search warrant for the car. The marshals then turned the case over to Philadelphia police officers. The police officers decided to summon "Ripper," a narcotics-sniffing dog, and his trainer. The police then took petitioner to the Philadelphia Detention Center and placed his money in a nearby field. Ripper found the money and "alerted" to it, indicating that the money had been in the presence of narcotics. Ripper was then taken to the parking lot, which contained ap-

proximately 20 cars, including petitioner's Cadillac. The dog "alerted" to the left rear of petitioner's car. Pet. App. 4-5.

The agents took the Cadillac to the United States Courthouse. A Philadelphia detective then prepared an affidavit in support of a search warrant for the car. On June 4, 1986, State Bail Commissioner Margaret McCook approved the search warrant. That afternoon, the detective executed the warrant and found about one kilogram of cocaine in the trunk of the car. Pet. App. 5.

2. Prior to trial, petitioner moved to suppress the cocaine found in his Cadillac. The district court denied the motion. It concluded that there was probable cause to search the Cadillac, that a search warrant was required, and that the warrant had been properly issued. Pet. App. 6.

3. The court of appeals affirmed in an unpublished memorandum (Pet. App. 1-10). Although petitioner raised several objections to the search warrant, the court concluded that it did not have to reach any issue relating to the warrant. It concluded, instead, that the agents were entitled to search the Cadillac, without a warrant, under the "automobile exception" to the warrant requirement. The court agreed with the district court (*id.* at 7-8) that there was probable cause for the seizure of the car, noting in particular petitioner's fugitive status, his prior arrest for a violent crime and for carrying a loaded weapon, his furtive movements when he was approached by the agents, his initial denial that he owned the car, and the fact that he was carrying a large sum of money at the time of his arrest. The court also concluded that those factors, plus the "alerts" by the narcotics-sniffing dog, gave the officers probable cause to search the Cadillac (*id.* at 8). Following this Court's decision in *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the court of appeals held that because a warrant need not be obtained to conduct a probable cause search

of an automobile, it was not necessary to address petitioner's various challenges to the search warrant (Pet. App. 8-10).

ARGUMENT

1. Petitioner contends (Pet. 12-18) that the search warrant for his car was issued in violation of Fed. R. Crim. P. 41, and that the evidence seized should have been suppressed. The court of appeals correctly refused to reach that issue, holding that under the "automobile exception," no warrant was required to search petitioner's car.

This Court has repeatedly stated that law enforcement agents may conduct a warrantless search of a car as long as they have probable cause to believe that evidence will be found in the car. See *United States* v. *Johns*, 469 U.S. 478 (1985); *Michigan* v. *Thomas*, 458 U.S. 259 (1982); *United States* v. *Ross*, 456 U.S. 798 (1982); *Chambers* v. *Maroney*, 399 U.S. 42 (1970). In the present case, the court of appeals, affirming the findings of the trial court, held that the agents had probable cause to believe that petitioner's Cadillac contained evidence of crime. The "alert" by a trained dog to petitioner's car,[1] together with petitioner's fugitive status, his evasive movements when the agents approached, his false denial that the Cadillac was his, and the amount of money in his possession, amply justified a finding that there was "a fair probability that contraband or evidence of a crime" would be discovered in the car (*Illinois* v. *Gates*, 462 U.S. 213, 238 (1983)). That fact-bound determination warrants no further review.[2]

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[1] See, *e.g.*, *United States* v. *Quinn*, 815 F.2d 153, 159 (1st Cir. 1987); *Garmon* v. *Foust*, 741 F.2d 1069, 1073 (8th Cir. 1984); *United States* v. *Hillison*, 733 F.2d 692, 696 (9th Cir. 1984); *United States* v. *Sullivan*, 625 F.2d 9, 13 (4th Cir. 1980), cert. denied, 450 U.S. 923 (1981).

[2] Petitioner contests (Pet. 14-15) the sufficiency of the probable cause, contending that the affidavit for the search warrant did not

2. Even if the "automobile exception" were inapplicable, the issuance of a federal search warrant by a Pennsylvania bail commissioner does not violate Fed. R. Crim. P. 41(a). Rule 41(a) provides that a warrant may be issued by "a judge of a state court of record." Under Pennsylvania law, a bail commissioner is a judicial officer of the Philadelphia Municipal Court and is empowered, among other things, to issue arrest and search warrants. See 42 Pa. Cons. Stat. Ann. § 1123(a)(5) (Purdon 1981 & Supp. 1987). And the Philadelphia Municipal Court is a court of record (*id.* §§ 321, 1121 *et seq.*).[3]

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state that Ripper had been trained or that he had been proven reliable in previous cases. Because no warrant was required, however, the sufficiency of the probable cause does not depend on the facts that were presented in support of the warrant. Petitioner does not dispute that at the suppression hearing the government established that Ripper had been amply trained and that he had previously proved reliable in detecting controlled substances. Petitioner also notes (*id.* at 15) the determination of the Assistant United States Attorney that there was insufficient probable cause to seek a search warrant. But the prosecutor made that determination before Ripper detected the scent of narcotics on petitioner's money and in his car. In any event, the prosecutor's assessment of probable cause is no basis for second-guessing the determination of the trial court, affirmed by the court of appeals, that probable cause was sufficient. See *United States* v. *Hayes*, 794 F.2d 1348, 1356 n.4 (9th Cir. 1986), cert. denied, No. 86-848 (Feb. 23, 1987).

[3] Petitioner seemingly acknowledges (Pet. 13) that under Pennsylvania law a bail commissioner may issue search warrants, but he suggests that the definition of "a state court of record" must be resolved "under federal standards" (*ibid.*). It is settled, however, that state law determines whether a particular officer is part of a "court of record." See, *e.g.*, *United States* v. *Comstock*, 805 F.2d 1194, 1201 n.7 (5th Cir. 1986), cert. denied, No. 86-6496 (Apr. 20, 1987); *United States* v. *Radlick*, 581 F.2d 225, 228 (9th Cir. 1978); *United States* v. *Sturgeon*, 501 F.2d 1270, 1274 (8th Cir.), cert. denied, 419 U.S. 1071 (1974). Petitioner's reliance (Pet. 13-14) on *United States* v. *Hanson*, 469 F.2d 1375 (5th Cir. 1972) is, for that reason, misplaced. In the *Hanson* case, the court of appeals held that under Texas law a justice

3. In any event, evidence seized in violation of Rule 41 need not automatically be suppressed. Suppression is required only if "(1) there was 'prejudice' in the sense that the search might not have occurred or would have not been so abrasive if the rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule" (*United States* v. *Stefanson*, 648 F.2d 1231, 1235 (9th Cir. 1981)). Accord *United States* v. *Stockheimer*, 807 F.2d 610, 613 (7th Cir. 1986), cert. denied, No. 86-6170 (Apr. 20, 1987); *United States* v. *Comstock*, 805 F.2d 1194, 1206-1207 (5th Cir. 1986), cert. denied, No. 86-6496 (Apr. 20, 1987); *United States* v. *Loyd*, 721 F.2d 331, 333 (11th Cir. 1983); *United States* v. *Burke*, 517 F.2d 377, 386-387 (2d Cir. 1975). In the present case, there is no reason to believe that an authorized judge would have withheld permission to conduct the search of petitioner's car, or that, had a judge granted permission, the search would have been conducted less intrusively. Moreover, the record nowhere suggests that the agents deliberately violated Rule 41(a). Indeed, the agents were amply justified in seeking a warrant from the bail commissioner, because Pennsylvania law specifically authorizes bail commissioners to issue search warrants. Cf. *Illinois* v. *Krull*, No. 85-608 (Mar. 9, 1987).

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of the peace is not a court of record and accordingly may not issue warrants under Rule 41. The court made clear, however, that "state law determines whether or not the state court is a court of record" (469 F.2d at 1377).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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